Petition

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IN THE SUPREME COURT
OF THE UNITED STATES

FALL TERM, 1981

NO. _____

PHILLIP JOHN ELLSWORTH,

PETITIONER/DEFENDANT,

v.

UNITED STATES OF AMERICA,

RESPONDENT/PLAINTIFF.

PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS, NINTH CIRCUIT
(C.A. 9TH NO. 80-1369)
(U.S.D.C. ALASKA No. A79-66 CR.)

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QUESTIONS PRESENTED FOR REVIEW

I. WHERE THE PROSECUTION INTENTIONALLY DISREGARDS A COURT ORDER TO REVEAL EXCULPATORY EVIDENCE WHICH IRREPARABLY HARMS DEFENSE COUNSEL'S TRIAL TACTICS SO AS TO CONSTITUTE A SUBSTANTIAL IMPOSITION ON THE DEFENDANT'S RIGHT TO COUNSEL, MAY THE PROSECUTION ESCAPE REVERSAL BY PLEADING "INADVERTENCE."

II. MAY A DEFENDANT BE DENIED HIS RIGHT TO TRIAL BY JURY BY AN APPELLATE COURT REVERSING AND SUMMARILY REMANDING FOR SENTENCING FOR THE OFFENSE OF SIMPLE ASSAULT ON A FEDERAL OFFICER WHERE THE TRIAL COURT IMPROPERLY DENIED A MOTION FOR A JUDGMENT OF ACQUITTAL AS TO ASSAULT WITH A DEADLY WEAPON AND A TRIAL JURY NEVER MADE A FACTUAL FINDING OF SIMPLE ASSAULT ON PROPERLY ADMITTED EVIDENCE.

III. DOES THE MERE FACT THAT AN INDICTMENT HAS BEEN RETURNED CONSTITUTE A SUFFICIENT BASIS FOR ISSUING A SEARCH

WARRANT AS TO A DEFENDANT'S HOME WHERE THERE IS NO PARTICULARIZED DESCRIPTION IN THE SEARCH WARRANT AFFIDAVIT OF FACTS TO DEMONSTRATE THAT A FEDERAL OFFENSE HAS OCCURRED OR FACTS TO DEMONSTRATE THAT THE DEFENDANT COMMITTED THE OFFENSE OR FACTS TO DEMONSTRATE THAT EVIDENCE OF THE OFFENSE WILL BE FOUND ON THE PREMISES SOUGHT TO BE SEARCHED?

TABLE OF CONTENTS

INTRODUCTORY STATEMENT..... 1

I. OPINION BELOW..... 2

II. JURISDICTION..... 3

III. CONSTITUTIONAL PROVISIONS, STATUES AND RULES INVOLVED..... 4

IV. STATEMENT OF THE CASE..... 5

A. FAILURE OF THE PROSECUTION TO REVEAL EXCULPATOR EVIDENCE DENIED THE DEFENDANT/APPELLANT HIS RIGHT TO COUNSEL..... 6

B. THE COURT OF APPEALS SUMMARILY REMANDED FOR SENTENCING WHERE THERE HAD BEEN NO JURY VERDICT AS TO A LESSER INCLUDED OFFENSE... 9

C. THE SEARCH WARRANT FOR THE DEFENDANT'S HOME WAS IMPROPERLY BASED ON THE MERE FACT OF INDICTMENT.....10

V. REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. THE COURT OF APPEALS HAS DECIDED THE IMPORTANT FEDERAL QUESTION OF RELIEF FROM PROSECUTORIAL MISCONDUCT IN FAILING TO REVEAL EXCULPATORY EVIDENCE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE NINTH CIRCUIT, WITH APPLICABLE DECISIONS OF THE OTHER FEDERAL COURTS OF APPEALS AND APPLICABLE DECISIONS OF THE U.S. SUPREME COURT.....11

1. THE OPINION IS IN ERROR CONCERNING THE EXTENT OF THE SUPPRESSION OF EXCULPATORY EVIDENCE BY THE PROSECUTION AND THE EFFECT ON DEFENDANT'S RIGHT TO COUNSEL.....13

i. THE FOUR STATEMENTS OF HOLMES, HICKS, NICHOLS AND PARSONS WERE NOT MADE KNOWN TO MR. KULIK PRIOR TO OPENING STATEMENT.....13

ii. THE PROSECUTION HAD POSSESSION OF AND DID NOT DISCLOSE THE KRUBA AND COX STATEMENTS IN THE AIRPORT POLICE REPORT....16

2. THE OPINION MISAPPREHENDS THE SHOWING REQUIRED OF A DEFENDANT WITH REGARD TO WHAT CONSTITUTES PROSECUTORIAL MISCONDUCT OR THE EFFECTS THEREOF AND THE PROPER RELIEF THEREFROM.....22

i. THE AUTHORITIES CITED BY THE OPINION ARE MISCITED AND DISTINGUISHABLE.....23

ii. THE OPINION MISCONCEIVES THE APPLICABLE LAW WITH REGARD TO WHETHER DELAY IN REVEALING EXCULPATORY EVIDENCE CAN CONSTITUTE SUPPRESSION AND THE SHOWING A DEFENDANT MUST MAKE FOR A NEW TRIAL AS A RESULT OF SAID DELAY.....27

3. REVERSAL IS WARRANTED AS AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.....31

B. THE OPINION DENIES THE DEFENDANT HIS RIGHT TO A JURY TRIAL ON THE ISSUE OF SIMPLE ASSAULT BY APPLYING ERRONEOUS LAW WITH REGARD TO A REMAND WHERE A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED BELOW WHICH IS IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS AND WITH THIS COURT.....33

C. THE OPINION APPLIES STANDARDS AS TO THE ISSUE OF PROBABLE CAUSE IN A SEARCH WARRANT WHICH IS IN CONFLICT WITH OTHER DECISIONS OF THE COURTS OF APPEALS AND THIS COURT; FURTHER THE OPINION MISAPPREHENDS RELEVANT FACTS WITH REGARD TO THE ISSUE OF PROBABLE CAUSE IN THE SEARCH WARRANT AFFIDAVIT.....39

CONCLUSIONS.....42

APPENDIX.....

TABLE OF AUTHORITIES

Page

Abney v. United States,
431 U.S. 651, 52 L.Ed.2d
651, 97 S.Ct. 2034 (1977)..... 38

Aguilar v. Texas,
378 U.S. 108 (1964)..... 41

Brady v. Maryland,
373 U.S. 83 (1963).....8,21
22,

Commonwealth v. Jackson,
331 A.2d 189, 191 (Penn. 1975)... 41

Ellsworth v. United States,
F.2d 2758, C.A. No.
80-1369.....2,13
14,17,20,28,39

Franks v. Delaware,
98 S.Ct. 1880 (1978)..... 32

Robinson v. United States,
333 F.2d 323 (8th Cir. 1964)...32,35
36

Spinelli v. United States,
393 U.S. 410 (1969)..... 41

United States v. Agurs,
427 U.S. 97 (9th Cir. 1976)....22,23
25, 28

United States v. Baxter,
492 F.2d 150 (9th Cir. 1974)..... 27

United States v. Billingslea,
603 F.2d 515 (5th Cir. 1979)..... 37

United States v. Brouillette,
478 F.2d 1171 (5th Cir. 1973).... 41

United States v. Burk,
506 F.2d 1165 (9th Cir. 1974)..23,25

United States v. Butler,
567 F.2d 885 (9th Cir. 1978)...29,31
32
United States v. Carter,
522 F.2d 666 (D.C. Cir. 1975)..33,36

United States v. Ciongoli,
358 F.2d 439 (3rd Cir. 1966)...32,35
36
United States v. Dubrofsky,
581 F.2d 208 (9th Cir. 1978)..... 41

United States v. Gerard,
491 F.2d 1300 (9th Cir. 1974).... 32

United States v. Goodman,
457 F.2d 68, 72 (9th
Cir. 1972)..... 27

United States v. Nowells,
594 F.2d 753 (9th Cir. 1979)..... 31

United States v. Opager,
589 F.2d 799 (5th Cir. 1979)..... 32

United States v. Pardone,
406 F.2d 560 (2nd Cir. 1969)..... 29

United States v. Pascual,
606 F.2d 561 (5th Cir. 1979)..... 32

United States v. Ramirez,
608 F.2d 1265 (9th Cir. 1979)..22,23
25
United States v. Roybal,
566 F.2d 1109 (9th Cir. 1978).... 32

United States v. Smith,
609 F.2d 1294 (9th Cir. 1974)..23,25
26
United States v. Trainor,
423 F.2d 263 (1st Cir. 1970)..... 27

United States v. Wilson,
284 F.2d 407 (1960)..... 36

Whittenburg v. United States,
366 F.2d 128 (D.C. Cir. 1976).... 37

UNITED STATES CODE

18 U.S.C. §1111.....4,5

18 U.S.C. §1114.....4,5

28 U.S.C. 1254 §1..... 4

United States Constitution

Amendment IV..... 4

Amendment V..... 4

Amendment VI..... 4

Federal Rules of Criminal Procedure

Rule 7..... 5

Rule 16..... 5

Rule 23..... 5

Rule 31..... 5

Rule 41..... 5

Supreme Court Rules of
Appellate Procedure
Rules 17 thru 23..... 4

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TO: THE HONORABLE CHIEF JUSTICE WARREN F. BURGER AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

The Petitioner, PHILLIP JOHN ELLSWORTH, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 15, 1981.

I. OPINION BELOW.

The opinion in the United States Court of Appeals for the Ninth Circuit in United States of America, Appellee, vs. Phillip John Ellsworth, Appellant, C.A. 9th No. 80-1369 (on appeal from United States District Court for the District of Alaska, Case No. A79-66 CR.) rehearing denied September 15, 1981, is officially reported in ___ F.2d 2758, and a copy of said opinion is attached hereto as Exhibit A in the Appendix.

Note that the slip opinion was amended in response to a Petition for Rehearing by written order of September 15, 1981 which is attached hereto as Exhibit B in the Appendix.

II. JURISDICTION.

The initial opinion in the United States Court of Appeals for the Ninth Circuit was entered on June 8, 1981. By written order of August 26, 1981, an extension of time to file a Petition for Rehearing and/or Suggestion for Appropriateness of Rehearing En Banc was granted until July 6, 1981 (Exhibit D of Appendix). The Petition for Rehearing and/or Suggestion of Appropriateness of Rehearing En Banc was filed by mail on July 6, 1981 and was denied by written order of September 15, 1981 (Exhibit E of Appendix). In addition, the initial opinion was amended in response to the Petition for Rehearing by written order of September 15, 1981 (Exhibit B of Appendix).

The Mandate issued on September 23, 1981; however, was recalled pursuant to motion by the defendant - appellant

Ellsworth by written order of October 21, 1981. (Exhibit F of Appendix).

Pursuant to a timely application for extension of time period in which to file a Petition for Writ of Certiorari, this court granted the petitioner up to and including November 20, 1981 to file same (Exhibit G of Appendix).

Jurisdiction is invoked under 28 U.S.C. 1254 §1, Rules 17 thru 23 of the U.S. Supreme Court Rules of Appellate Procedure, and 18 U.S.C. §1111 and 18 U.S.C. 1114. The instant Petition is timely under Supreme Court Rule 20 since filed within the time period previously set out by this court for filing same.

III. CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

This case involves the IV (Freedom from Search and Seizure), V (Right to Due Process), and VI (Right to Notice, Confrontation, To Call Witnesses, and Jury Trial), Amendments to the U.S.

Constitution; Rule 7 (Indictment), 16 (Discovery), 23 (Trial by Jury or Court), 31 (Verdict), 41 (Search and Seizure) of Federal Rules of Criminal Procedure; and 18 U.S.C. §1111 (Assaulting, Resisting, or Impeding Certain Officers of Employees), and 18 U.S.C. §1114 (Protection of Officers and Employees of the United States. Their text is set out in the Appendix as Exhibit H.

IV. STATEMENT OF THE CASE

Mr. Ellsworth was convicted of assault with a dangerous weapon on a federal officer under 18 U.S.C. §1111 and 1114. The Court of Appeals reversed the ADW conviction due to insufficient evidence and summarily remanded for sentencing as to simple assault on a federal officer (felony).

A. FAILURE OF THE PROSECUTION TO REVEAL EXCULPATORY EVIDENCE DENIED THE DEFENDANT/APPELLANT HIS RIGHT TO COUNSEL.

Despite a specific court order to disclose immediately "Brady" materials specifically requested by the defense as to evidence that indicated identification by the alleged eye-witnesses of another person as striking the purported victim, the prosecution intentionally did not provide six statements in a timely fashion.

Moreover, the prosecutor's suppression irreparably harmed the defendant's right to counsel since his lead counsel, Mr. Kulik, was tricked into making an opening statement which conceded the issue of identity without knowledge of the exculpatory material that would have given rise to an identity

defense.[1]

The opinion of the Court of Appeals incorrectly stated that four of the witness statements were made known to Mr. Kulik prior to opening statement and further incorrectly stated that the record did not reveal that the crucial "airport police report" was in the government's possession.

In response to a Petition for Rehearing and/or Suggestion of Appropriateness of Rehearing En Banc, the Court of Appeals ignored its error with regard to its assertation that the four statements had been given to Mr. Kulik prior to opening statement and simply deleted by amendment its error in stating that the government had not possessed the exculpatory material, substituting a

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[1] Note that Mr. Ellsworth never testified and never admitted being the perpetrator of the purported assault.

passage stating that the government was unaware of the material in its own file until after trial, thus allowing the prosecution to avoid by a plea of "inadvertence" the failure to comply with a court order and the resulting prejudice to the defendant's right to counsel.

This ignores the fact that the defendant never was able to have an evidentiary hearing or cross examine the Assistant U.S. Attorneys as to their purported assertion of "inadvertence".

Further, Rule 16 and Brady, supra, contain a continuing duty to disclose and apply to all material in the prosecutor's files.

B. THE COURT OF APPEALS SUMMARILY REMANDED FOR SENTENCING WHERE THERE HAD BEEN NO JURY VERDICT AS TO A LESSER INCLUDED OFFENSE.

The Court of Appeals properly reversed on the greater offense of assault with a deadly weapon as to a federal officer due to insufficient evidence below; however, the court then summarily remanded for resentencing despite the fact that Mr. Ellsworth has never been convicted by a jury as to the factual question of assault. That is, the jury improperly relied below on "sap gloves" which the Court of Appeals found should not have been introduced into evidence and thus there has never been a factual finding as to any means of assault or actual assault in terms of simple assault.

C. THE SEARCH WARRANT FOR THE DEFENDANT'S HOME WAS IMPROPERLY BASED ON THE MERE FACT OF INDICTMENT.

There was never any particularized description by witnesses on the scene as to Mr. Ellsworth, and no indication in the affidavit in support of the search warrant to demonstrate that a federal offense had occurred other than the fact that an indictment had been returned against Mr. Ellsworth. Despite this lack of particularized description as to Mr. Ellsworth or the offense the search warrant was sustained by the lower court and the Court of Appeals.

VI. REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. THE COURT OF APPEALS HAS DECIDED THE IMPORTANT FEDERAL QUESTION OF RELIEF FROM PROSECUTORIAL MISCONDUCT IN FAILING TO REVEAL EXCULPATORY EVIDENCE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE NINTH CIRCUIT, WITH APPLICABLE DECISIONS OF THE OTHER FEDERAL COURTS OF APPEALS AND APPLICABLE DECISIONS OF THE U.S. SUPREME COURT.

The defense made a specific request in writing as to evidence that might indicate identification by the alleged eye-witnesses of another person as striking Mr. Cox, the purported victim. Moreover, a specific court order was issued requiring said disclosure. Nonetheless, the prosecution did not provide six statements in a timely manner.

Moreover, this failure irreparably harmed Mr. Ellsworth's right to counsel

since his counsel, Mr. Kulik, was tricked into making an opening statement which conceded the issue of identity without knowledge of the exculpatory material that would have given rise to an identity defense.

1. THE OPINION IS IN ERROR CONCERNING THE EXTENT OF THE SUPPRESSION OF EXCULPATORY EVIDENCE BY THE PROSECUTION AND THE EFFECT ON DEFENDANT'S RIGHT TO COUNSEL.

i. THE FOUR STATEMENTS OF HOLMES, HICKS, NICHOLS AND PARSONS WERE NOT MADE KNOWN TO MR. KULIK PRIOR TO OPENING STATEMENT. In opening statement, defense counsel Kulik stated: "No one has questioned, as I have stated before, that the assault occurred ... Mr. Ellsworth did, indeed, give him a black eve." United States v. Ellsworth, Slip Opinion at ____ F.2d 2716, n.3. (emphasis added) (hereinafter Ellsworth, supra, at ____ F.2d _____).

The opinion attempts to avoid this prejudice by incorrectly stating that four of the statements in question were delivered to defense counsel prior to

opening statements.[2]

In fact, Mr. Kulik, who was lead counsel, has consistently asserted that he never saw the statements in question until after opening statements so as to have been "sand bagged" into a tactical decision which irreparably harmed his client's rights to a defense as to identity.[3]

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[2] On March 12, 1980, prior to making of opening statements by either party, Assistant U.S. Attorney Nelson P. Cohen delivered to defense counsel John Suddock, at defense counsel's table in the courtroom, copies of the statements of Dora Holmes, Mary Hicks, Michael Nichols and Ed Parsons... . "At one juncture in the processing of the post conviction motion for a new trial defendant's counsel contended that the information was furnished after opening statement but did not substantiate this claim." Ellsworth, supra at 2761, n.4; (emphasis added)

[3] In his reply brief Mr. Kulik stated: Concerning the statements of witnesses Hicks, Holmes, Parsons and Nichols, the government's position is that the evidence is not suppressed within the meaning of Brady because copies of those statements were provided

Thus, prejudice has occurred to defendant's right to counsel, as a result of the prosecutorial misconduct.

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[3] (cont.) to defense counsel prior to opening statement.

This proposition was emphatically denied by defense counsel in a sworn affidavit stating that he did not receive those witness statements until after opening statement had been made and after trial had commenced. The government's counsel does not directly contradict that affidavit but, obliquely, offers the affidavit of an FBI agent who states that he saw Assistant U.S. Attorney Cohen drop copies of the statements on a counsel table in the courtroom where another attorney, assisting defense counsel, was seated. What can be distilled from the government position and the FBI agent's affidavit is that the Assistant U.S. Attorney evidently decided to contrive a sneaky, puerile locker room artifice or practical joke. Looking at the record in the light most favorable to the government, the Assistant U.S. Attorney, moments before the opening statements commenced, silently dropped several pages of clear Brady material on counsel table in the Courtroom while counsel was busy making last minute notes in preparation for his opening statement. It is not even contended by the government that the witnesses' statements were brought to the attention of defense counsel; that the Assistant U.S. Attorney even uttered a word that would alert counsel to the fact that the government's attorney was

ii. THE PROSECUTION HAD POSSESSION OF AND DID NOT DISCLOSE THE KRUBA AND COX STATEMENTS IN THE AIRPORT POLICE REPORT.

The initial opinion prior to the Petition for Rehearing erroneously stated:

> The record does not reveal that an Airport police report was suppressed, withheld, or tardily produced by the government. The government's brief states that the report was discovered after trial; in his reply brief appellant does not refute this. It is elementary

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3 (cont.) tendering exculpatory evidence. (Appellant's Reply Brief, at 9-10; emphasis added)

While a review of the record by undersigned counsel does not reveal a sworn affidavit by Mr. Kulik to the effect that he did not get the four statements until after the opening statements, he does so state at least four times in the record. See, Excerpt of Record at 155, 156, 157, 158, 142, 211, 212. His statements as an officer of the court should carry the same effect as an affidavit, particularly since he felt that he had sworn to those facts, as set out in the Reply Brief quoted above.

After arguing the instant matter before the Ninth Circuit Court of Appeals, Mr. Kulik died in a scuba diving accident in Hawaii such that the opportunity for further affidavits in support of this assertation are precluded.

that the government cannot suppress that which it does not have, or know about. Ellsworth, supra at 2763. (emphasis added).

In fact, the two statements of Kruba and Cox, which contained exculpatory information as to identity, were never produced by the prosecution until the defendant discovered the existence of said reports in post-verdict depositions conducted in civil litigation arising out of the incident in question.

Most significantly, the government had the statements in its possession throughout and did not concede that point until after its appellee's brief was filed before the Ninth Circuit.[4]

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[4] ...With respect to the last two statements the government after filing the appellee's brief, filed and served an addendum and accompanying affidavits in which the government acknowledged that it never produced those statements of the alleged victim and the other witnesses to defense counsel; that the government

In fact, the Court of Appeals for the Ninth Circuit appears to have been

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4 (cont.) erred during the post trial motions when it declined to acknowledge possession of those statements; that the government again erred in its briefing before this court when it contended that it never had possession of those statements. (Appellant's Reply Brief at page 10). This was additionally pointed out by the appellant at page 6 of his Reply Brief:

"The Airport police reports (CR 177, Ex. B) symbolize the government's stubborn refusal to attempt even minimal compliance with the lower court's discovery order and the constitutional mandate of Brady. Notwithstanding the defendant's request for exculpatory evidence (CR 82), the court's March 6th order granting that request (CR 109) defendant's July 8th motion for a new trial on the grounds of newly discovered evidence (CR 174), and defendant's July 8th motion for discovery or a hearing to determine whether the United States had been in possession of the Airport police reports (CR 176), the government steadfastly maintained that it did not have those reports until November 5th when they filed an addendum to its brief acknowledging its possession of the reports since the inception of the prosecution. (Appellant's Reply Brief at page 6, emphasis added).

The addendum and affidavits in which the government finally conceded possession of the reports is included in the Appendix as Exhibit H.

further misled by the prosecution due to its tardy acknowledgement of that fact after filing its opening brief.

Thus the government failed to comply with the District Court's pre-trial order, "sand bagged" defense counsel with regard to four of the statements in question by purportedly dropping them silently on counsel table next to an associate while lead counsel was beginning his opening statement, and willfully withheld two of the reports, continuing to assert they did not have same until forced to concede possession in an addendum to appellee's brief.

Moreover, this misconduct clearly affected the defendant's right to counsel insofar as it affected trial counsel's tactical decision to concede identity in opening statement.[5]

Nonetheless, when the Court of Appeals was confronted with its own error in the Petition for Rehearing, it still refused to grant rehearing and reverse and simply "amended" the opinion such that the crucial passage which had relied upon the fact that the government did not have the exculpatory material was changed to read:

> The record reveals that an Airport police report was in the government's file several months before trial, but that the government remained unaware of it until after trial. The ... . (E)lsworth,

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[5] As set out at page 141 of the Excerpt of Record, Mr. Kulik informed the court and the U.S. Attorney in chambers prior to trial that he was going to concede identity. Thus the prosecution was on notice of the effect on trial strategy of its misconduct.

supra, at ____ F.2d ____ (emphasis added) (See, Exhibit B herewith for Order Amending Opinion.

It is well established that the prosecution is chargeable with knowledge of all materials in its files. Even more importantly, here, it is demonstrated that an Assistant U.S. Attorney assigned to the case had possession of the material in his file and nonetheless disclosure was not made.

Rule 16 and Brady both contain a continuing duty to disclose, particularly in the face of a specific defense request and court order.

Reversal is necessary and warranted.

2. THE OPINION MISAPPREHENDS THE SHOWING REQUIRED OF A DEFENDANT WITH REGARD TO WHAT CONSTITUTES PROSECUTORIAL MISCONDUCT OR THE EFFECTS THEREOF AND THE PROPER RELIEF THEREFROM.

The opinion requires a demonstration that the suppressed evidence would "give rise to a reasonable doubt in light of the entire record." (citing United States v. Ramirez, 608 F.2d at 1265). Ellsworth, supra at 2763.

Further, the opinion holds:

> ...The evidence was not suppressed by the prosecutor here; it was tardily produced, but it was produced before opening statements. Ellsworth, supra at 2763 (emphasis added).

This misstates the law with regard to what constitutes "suppression" within the meaning of United States v. Agurs, 427 U.S. 97 (1976) and Brady v. Maryland, 373 U.S. 83 (1963) and with regard to the degree of prejudice to the defendant must demonstrate to warrant relief.

i. THE AUTHORITIES CITED BY THE OPINION ARE MISCITED AND DISTINGUISHABLE. United States v. Ramirez, 608 F.2d 1261 (9th Cir. 1979); United States v. Smith, 609 F.2d 1294 (9th Cir. 1974), and United States v. Burk, 506 F.2d 1165 (9th Cir. 1974) are miscited insofar as they do not hold that delay does not constitute suppression.

In United States v. Ramirez, supra, defense counsel was given an opportunity to recover from any prejudice resulting from delay.[6] Here, a continuance would

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[6] "Defense counsel was informed the morning of trial and had two opportunities thereafter to question Zamora about the alleged threats, first on cross-examination during the prosecution's case and second on direct examination when Zamora noted that an hour long lunch recess was taken during the course of appellant's initial cross-examination of Zamora. We conclude that appellant had an adequate albeit brief opportunity to prepare his defense. Moreover defense counsel could have moved for a continuance had it been demonstrated that circumstances prevented the presentation

not have been effective since the concession of identity in opening statement had already been made and the harm could not be repaired.

More important the Ramirez case was bottomed on the fact that there had been no specific defense request for the evidence, such that the "reasonable doubt" standard applies.[7] In the instant matter, there had been a specific defense request for the evidence and further a specific court order covering same such

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[6] (cont.) of an effective defense." Ramirez, supra at 1265; (emphasis added).

[7] "The standard of materiality varies with the situation in which Brady applies. United States v. Agurs [citations omitted] Where, as in the instant case, there has been no specific defense request for the evidence, the failure to disclose violates due process only, if the omitted evidence creates a reasonable doubt [about the defendant's guilt] that did not otherwise exist. Id., at 112, 96 S.Ct. at 2402. United States v. Ramirez, supra at 608 F.2d 1265; (emphasis added, footnote omitted).

that the stricter standard of Agurs should apply.

United States v. Burk, supra also dealt with a situation in which there had been no specific defense request and further adequate opportunitv was provided the defense counsel to recover from any prejudice that might result from the delay.[8]

Likewise, United States v. Smith dealt with a situation in which adequate opportunitv was afforded defense counsel to recover from anv prejudice.[9]

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[8] See, United States v. Burke, supra at 506 F.2d 1168, 1169.

[9] More importantlv, he offered defense counsel an opportunitv to recall Herrin as a witness on the following dav to cross-examine him on anything found in the report, and he told counsel that if the Court were informed of anything of significance found in the report then it would reconsider its decision to deny the motion to strike... . These actions sufficientlv protected Lami from any prejudice in the delayed disclosure.

In the instant matter, it is clear that the delayed disclosure seduced Mr. Kulik into the fatal concession as to indentity in the opening statement, and said prejudice could not be corrected.

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[9] (cont.) United States v. Smith, supra at 609 F.2d 1303; (emphasis added, citations omitted).

ii. THE OPINION MISCONCEIVES THE APPLICABLE LAW WITH REGARD TO WHETHER DELAY IN REVEALING EXCULPATORY EVIDENCE CAN CONSTITUTE SUPPRESSION AND THE SHOWING A DEFENDANT MUST MAKE FOR A NEW TRIAL AS RESULT OF SAID DELAY. The Ninth Circuit has held squarely that delay in turning over favorable evidence can constitute suppression.

> Whether the delay in turning over requested favorable evidence amounts to unconstitutional suppression of it depends upon whether the delay in disclosure substantially prejudiced defendants in the preparation of the defense. See, United States v. Trainor, 423 F.2d 263 (1st Cir. 1970); see also, United States v. Goodman, 457 F.2d 68, 72 (9th Cir. 1972). United States v. Baxter, 492 F.2d 150 at 174 (9th Cir. 1974); (emphasis added).

While in Baxter the Court affirmed, the Court did so since defense counsel had two weeks to prepare with regard to tardily disclosed physical evidence and four days to prepare with regard to tardily disclosed grand jury testimony.

Here, Mr. Kulik was not given four of the statements in question until after the irreparable harm had occurred in opening statement and was never given the Airport police reports.

The standard for review of the effect of the failure to provide exculpatory evidence, where there has been a specific request by the defense, and a Court order compelling disclosure, is whether it might have effected the outcome of the trial. United States v. Agurs, 427 U.S. 104.

Thus, the opinion was in error in requiring the defendants to demonstrate that the information was "of such materiality or impact as to create a reasonable doubt that did not otherwise exist." Ellsworth, supra at 2763; (emphasis added).

The Second Circuit has held that the government may not lull defense counsel

into an unwise tactical decision by withholding discoverable material.

> Had defense counsel known the contents of the statement, he might well have advised (defendant) not to take the stand. United States v. Pardone, 406 F.2d 560, 561 (2nd Cir. 1969); (emphasis added).

Moreover, the Ninth Circuit has recognized the defendant does not have to demonstrate that the jury necessarily would have changed its verdict, but simply that the material might have affected its judgment on a material point.

> The proper standard in negligent nondisclosure cases should call for a new trial wherever the nondisclosed evidence might reasonably have effected the jury's judgment on some material point, without necessarily requiring a supplemental finding that it would also have changed its verdict. United States v. Butler, 567 F.2d 885, at 890 (9th Cir. 1978); (emphasis added).

Since it is clear the government willfully and/or recklessly failed to disclose the information in the light of a specific request and a specific court

order, and it is clear that it affected Mr. Kulik's trial tactics, and thus Mr. Ellsworth's right to counsel, and certainly would have affected the jury's judgment on identity, reversal should follow.

3. REVERSAL IS WARRANTED AS AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In the face of the willful or grossly reckless failure of the prosecution to comply with a specific request by the defendant and a court order as to "Brady" material, this court should order reversal as an exercise of its supervisory power to see that orders of the court are obeyed. Where prosecutorial wrong doing is demonstrated, the Ninth Circuit has an almost per se standard granting new trials if the suppressed evidence would have been "favorable or material" to the defense. See, United States v. Butler, supra at 891; United States v. Nowells, 594 F.2d 753 (9th Cir. 1979). The situation is akin to that presented by an intentional or grossly reckless statement made by an officer in an application for a search warrant. That is, where there has been a "substan-

tial imposition" on the magistrate, suppression is warranted.

This is so since otherwise the prosecution can reap the fruits of its wrong doing with no reasonable expectation of restraint. See, Franks v. Delaware, 98 S.Ct. 1880 (1978).

Here, the court should invoke its supervisory power, grant certiorari, and reverse since the misconduct produced the fatal concession in opening statement as to identity. In addition to United States v. Butler, supra, the Court's attention is directed to United States v. Gerard, 491 F.2d 1300, 1302-03 (9th Cir. 1974); United States v. Roybal, 566 F.2d 1109 (9th Cir. 1978); United States v. Pascual, 606 F.2d 561 (5th Cir. 1979); United States v. Opager, 589 F.2d 799 (5th Cir. 1979).

B. THE OPINION DENIES THE DEFENDANT HIS RIGHT TO A JURY TRIAL ON THE ISSUE OF SIMPLE ASSAULT BY APPLYING ERRONEOUS LAW WITH REGARD TO A REMAND WHERE A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED BELOW WHICH IS IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS AND WITH THIS COURT.

The opinion properly recognized and held that the evidence was insufficient to support a verdict of guilty of assault with a deadly weapon. However, the opinion then incorrectly held:

> ... We do find however, an abundance of evidence to support a verdict of guilty of the lesser offense of assault, with force.
>
> That being so, "(t)he conviction can stand, but with a sentence appropriate for the lesser included offense" United States v. Ciongoli, 358 F.2d 439, 441 (3rd Cir. 1966); Robinson v. United States, 333 F.2d 323 (8th Cir. 1964); see also, United States v. Carter, 522 F.2d 666, 685, n.56 (D.C. Cir. 1975); Rule 31(c) Federal Rules of Criminal Procedure. ... We do vacate the sentence because it was imposed under the greater offense and remand the cause to the trial court for sentence under a lesser included offense of forceable assault... . Ellsworth, supra at 2767; (emphasis added).

This order deprived Mr. Ellsworth of his constitutional right to trial by jury as to the lesser included offense.

That is, the improper jury verdict was not supported by any sufficient evidence as to the use of a deadly weapon. Thus, the jury must have relied upon the "sap gloves" which were improperly admitted into evidence, and consistently displayed to the jury so as to inflame their passions.

Most significantly, the improper verdict as to assault with a deadly weapon had to contain an improper factual finding by the jury that the gloves, which were actually irrelevant, were used by Mr. Ellsworth. That being so, there has never been a jury verdict as to proof beyond a reasonable doubt as to facts (i.e., instrumentalities etc.) so as to constitute a simple assault.

United States v. Ciongoli, supra at 358 F.2d 441, is miscited since that case did not include a remand for summary sentencing so as to deprive the defendant of a trial by jury, but simply dealt with a situation in which the government had appealed the dismissal of an indictment and the court remanded holding that the jury might be instructed as to the lessor included offense. The Ciongoli opinion is dicta as to the jury trial issue.

Robinson v. United States, supra, cited in the opinion and cited in Ciongoli, dealt with a situation in which there was no dispute as to the instrumentality of the offense (stolen dresses) but simply a dispute as to the value of the dresses. Further, the Robinson opinion was issued on June 16, 1964, and directed a remand for a sentence not in excess of one year commencing as of September 23, 1963, such that it was

apparent Mr. Robinson would be released immediately and not have to face resentencing without having a jury act specifically on the lessor included. Thus, save for the collateral consequences of the misdemeanor conviction the language in Robinson is dicta. United States v. Wilson, 284 F.2d 407 (1960) cited in Ciongoli, supra, and Robinson, supra, likewise dealt with a situation in which the appellant had already served more than a year such that the summary remand did not involve the potential resentencing of the defendant without a jury acting as to the lessor included. Further the Wilson case likewise dealt with a situation in which there was no dispute as to the instrumentality (i.e., stolen guns) but merely as to the value.

Accordingly, Wilson, supra, should also be viewed as dicta as to whether an appellate court can summarily remand for

sentencing on a lessor included where the defendant has not already served the time and where there has been no jury verdict as to the actual facts of the alleged instrumentalities of the lessor included.

United States v. Carter, 522 F.2d 666, n.56, likewise did not remand for summary sentencing, but simply remanded for a retrial on the lessor included. Thus, the Carter decision simply stands for the proposition that a retrial may be had on a lessor included offense, not that there may be a summary resentencing where there has been no jury verdict as to the factual elements of the lessor included.

In this regard, the Court's attention is directed to the United States v. Billingslea, 603 F.2d 515 (5th Cir. 1979) and Whittenburg v. United States, 366 F.2d 128 (D.C. Cir. 1976) for the proposition that after a successful

appeal as to sufficiency, or after an acquittal on one count of a multiple count indictment, a retrial is only allowed as to the lessor included for which the initial jury made a specific factual finding, and summary sentencing may not be ordered unless there was such a specific factual finding. See, e.g., Abney v. United States, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977).

Accordingly, since Mr. Ellsworth was properly entitled to a judgment of acquittal as to the greater offense, and the jury has never made a factual finding as to elements of the lessor offense, (that is, a finding independent of the improper evidence as to sap gloves), this Court should remand for a new trial as to the lessor included offense.

C. THE OPINION APPLIES STANDARDS AS TO THE ISSUE OF PROBABLE CAUSE IN A SEARCH WARRANT WHICH IS IN CONFLICT WITH OTHER DECISIONS OF THE COURTS OF APPEALS AND THIS COURT; FURTHER THE OPINION MISAPPREHENDS RELEVANT FACTS WITH REGARD TO THE ISSUE OF PROBABLE CAUSE IN THE SEARCH WARRANT AFFIDAVIT.

The Opinion incorrectly states that the search warrant affidavit states witnesses on the scene identified Mr. Ellsworth with the crime:

> In addition to the information supplied by the witnesses on the scene identifying appellant with the alleged crime, and thus targeting his house as the possible location of critical evidence, we have the indictment. Ellsworth, supra at 2765; (emphasis added).

In fact, there was never any particularized description by witnesses on the scene as to Mr. Ellsworth. The affidavit simply stated that witnesses on the scene gave a description which was

generally consistent with that of Mr. Ellsworth.

Moreover, there is no indication in the affidavit of facts to even demonstrate that a federal offense had occurred other than the face of the indictment.

The affidavit did not contain any information as to witnesses that actually identified Mr. Ellsworth. Throughout the affidavit the only reference to identification by witnesses was information that was "generally consistent with that of Phillip Ellsworth". (CR 90, Exhibit "A", page 3).

Thus, it is clear that no witnesses ever gave a particularized description of Mr. Ellsworth.

Thus, the affidavit is silent as to both the source and even existence of any such information. Aguilar v. Texas, 378

U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

It is well established that mere affirmations of conclusions without particularized facts is not sufficient so as to identify a target defendant. See, United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); Commonwealth v. Jackson, 331 A.2d 189, 191 (Penn. 1975).

Further, there must be particularized facts to demonstrate that a federal offense had occurred. United States v. Brouillette, 478 F.2d 1171 (5th Cir. 1973).

Thus, the opinion is in error in stating that witnesses purportedly identified Mr. Ellsworth and in failing to recognize that there is insufficient evidence in the affidavit that a federal offense actually occurred other than the reference to the indictment.

CONCLUSIONS

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari and after hearing the case on its merits should reverse insofar as:

1. Prosecutorial misconduct substantially affected Mr. Ellsworth's right to counsel due to the failure to reveal exculpatory evidence as to eye witness identification in the face of a specific defense request and a specific court order requiring disclosure of same and the circumstances in which the material was actually in the prosecution's file. Said failure "sand bagged" defendant's counsel into a fatal tactical error and further would have had a substantial impact on the jury's verdict had it been revealed during trial.

2. Mr. Ellsworth was denied his right to a jury trial on the issue of simple assault since the jury below

improperly relied upon evidence not admissible in order to reach the greater verdict of assault with a dangerous weapon and there has never been a jury verdict as to simple assault.

3. The search warrant affidavit was insufficient since there was no particularized description of the defendant and no particularized description of facts to demonstrate a federal offense had occurred; but a mere naked assertation that an indictment had been returned against the defendant.

DATED this 18th day of November, 1981.

DRATHMAN & WEIDNER
Attorneys for Ellsworth

By Phillip Paul Weidner
Phillip Paul Weidner

CERTIFICATE OF MAILING

I hereby certify that pursuant to the Supreme Court Rules of Appellate Procedure that I am a member of the Bar of the United States Supreme Court in good standing and that three copies of the foregoing Petition for Writ of Certiorari for the Ninth Circuit Court of Appeals was served upon counsel for respondent/plaintiff, United States of America, by depositing same in the United States Mails in Anchorage, Alaska, postage prepaid, addressed to: Michael Spaan, United States Attorney, Box 5, 701 C Street, Anchorage, Alaska 99513.

DATED this 20th day of November, 1981.

Phillip Paul Weidner

PHILLIP PAUL WEIDNER

SUBSCRIBED AND SWORN to before me this 20th day of November, 1981.

Notary Public in and for Alaska, My Commission Expires: 11-22-83

TARGET APPENDIX H-4

Appendix

APPENDIX

Exhibit A	OPINION
Exhibit B	ORDER AMENDING OPINION
Exhibit C	ITEMS REGARDING ADDENDUM TO BRIEF OF APPELLEE
Exhibit D	ORDER GRANTING EXTENSION OF TIME IN WHICH TO FILE PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC
Exhibit E	ORDER DENYING PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC
Exhibit F	ORDER GRANTING MOTION TO RECALL MANDATE
Exhibit G	ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI
Exhibit H	CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Exhibit A

OPINION

9TH CIRCUIT COURT OF APPEALS

(Decided June 8, 1981;
Rehearing Denied September 15, 1981;
Amended by Order September 15, 1981)

UNITED STATES of America,

Plaintiff-Appellee,

v.

Phillip John ELLSWORTH,

Defendant-Appellant.

No. 80-1369.

United States Court of Appeals

Ninth Circuit

Argued and Submitted Feb. 5, 1981

Decided June 8, 1981

Defendant was convicted in the United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, of assaulting a federal officer with a deadly weapon, and

he appealed. The Court of Appeals, Helphill, District Judge, held that: (1) conduct of prosecution in responding to defense request for exculpatory evidence by opposing delivery of statemetns of potential witnesses until time of trial did not violate defendant's right to due process; (2) indictment sufficiently advised defendant of charge against him; (3) trial court did not fail to charge an essential element of the offense; (4) warant to search defendant's house was not issued without sufficient factual basis; and (5) evidence was not sufficient to support verdict of guilty of assault with a deadly weapon but was sufficient to support verdict of guilty of lesser offense of assault, with force.

Affirmed in part, reversed in part and remanded.

1. Constitutional Law

Conduct of prosecution in responding to defense request for exculpatory evidence by opposing delivery of statements of potential witnesses until time of trial did not violate defendant's right to due process. U.S.C.A. Const. Amend. 5.

2. Assault and Battery

Indictment charging defendant with assaulting a federal officer sufficiently advised defendant of charge against him and was not fatally defective for failing to allege that victim was a Department of Interior employee assigned to one of duties enumerated in statute. 18 U.S.C.A. §§111, 1114; Fed. Rules Cr.Proc. Rule 7(c)(1), 18 U.S.C.A.

3. Assault and Battery

In prosecution for assaulting a federal officer, trial court did not fail to charge an essential element of the

offense. 18 U.S.C.A. §§ 111, 1114.

4. Searches and Seizures.

Credible information of assault witnesses, who were from general public, coupled with fact of defendant's indictment, was sufficient basis for issuing warrant to search defendant's house.

5. Searches and Seizures.

Only probability, and not a prima facie showing, of criminal activity is standard for establishing probable cause required to be shown in procuring search warrant; in judging probable cause, issuing magistrates are not to be confined by nigardly limitations or by restrictions on use of their common sense.

6. Searches and Seizures.

An indictment alone does not constitute sufficient probable cause to issue a search warrant.

7. Assault and Battery.

In prosecution for assault with a deadly weapon, there was no evidence linking weighted gloves found in defendant's house to crime committed, but evidence was sufficient to support verdict of guilty of lesser offense of assault with force. 18 U.S.C. § 111.

Appeal from the United States District Court for the District of Alaska.

Before BROWNING, Chief Judge, TANG, Circuit Judge and HEMPHILL*, District Judge.

* Honorable Robert W. Hemphill, Senior United States District Judge for the District of South Carolina, sitting by designation.

HEMPHILL, District Judge:

Appeallant appeals from the final judgment of the district court, entered May 23, 1980, after a jury finding of guilt March 14, 1980. The superseding indictment was lodged with the Court October 23, 1979, upon the finding of a true bill by the Grand Jury, and charged:

> That on or about the 15th day of October, 1979, Anchorage, Alaska, in the District of Alaska, PHILLIP JOHN ELLSWORTH, unlawfully, wilfully and by means of a dangerous weapon, that is, a pair of black leather type gloves weighted in the areas of the knuckles, did forcibly assault, resist, oppose, impede, intimidate and interfere with Jerry Lee Cox, a Petroleum Engineer Technician of the Conservation Division of the United States Geological Service of the Department of the Interior, while he

was engaged in the performance of his official duties, all in violation of Title 18, United States Code, Section 111[1] and 1114[2]

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[1] 18 U.S.C. § 111 provides:

§111. ASSAULTING, RESISTING, OR IMPEDING CERTAIN OFFICERS OR EMPLOYEES. Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interfers with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such act uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[2] 18 U.S.C. § 1114 reads, in part:

§1114. PROTECTION OF OFFICERS AND EMPLOYEES OF THE UNITED STATES GOVERNMENT.

Whoever kills any...officer or employee of the...Department of the Interior designated by the...Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoratin of game and other wild burds and animals, ...or any officer or employee of the...Department of the Interior...assigned to perform

Appellant was sentenced to the custody of the Attorney General, or his authorized representative, for a period of three (3) years. He presents five issues for review by this court, seriatim.

SALIENT FACTS

On October 15, 1979 the victim in this case, Jerry Lee Cox, was employed by the United States Geological Survey (USGS) of the Department of the Interior of the United States as a Petroleum Engineer Technician. His duties included inspections to enforce safety and environmental regulations concerning oil rig drilling apparatus and operations that called for observation and testing of casing, cement, and plug and abandonment operations. If regulations

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[2] investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, ...

were violated, he had authority to shut down the operation. The well in question had been shut down by a workers' strike, and inspection was required before operations could resume. Pursuant to a request by the oil company conducting operations, Cox's supervisor, Louis Dale Roberts, instructed him to travel on October 15, 1979, to the National Petroleum Reserve of Alaska on the North Slope of Alaska to inspect test well No. 1, Rig 25. According to Cox, Roberts, and their department regulations, Cox was on duty on the job when he left his house to travel to the airport, where he was to enplane for the North Slope.

At about 6:00 AM that day a large gathering had collected in the parking lot of Great Northern Air terminal at Anchorage. Some carried picket signs. Those inside the terminal "stood out" from the rest in that they had no

luggage, no arctic gear and did not check in at the counter. One of them wore black leather gloves inside the terminal and repeatedly slammed his gloves together. He was the larger of the two and comparably larger than almost anyone else there at the time.

Cox arrived at the terminal, checked his bags, and went to the coffee machine where he poured a cup. While standing there with the cup in one hand and his parka in the other, he was struck on the left side of his face. The assailant was heard to say "You goddam scabs are going to take away all our jobs." The attack was completely unprovoked.

The United States presented eyewitness testimony, physical evidence and an admission by the defendant to

prove identity.[3] It never stipulated to Ellsworth's identity as the attacker although the defense offered such a stipulation. Cox testified the attacker was a large man, over 6 feet 2 inches tall, 220 pounds in weight, wearing a dark jacket and dark gloves. He pointed to Ellsworth at trial as the person he believed to have struck him. Additinally, Willilam L. Hess, who was also enroute to NPRA to work on Rig 25 as a roughneck, saw the unprovoked attack. In open court he identified Ellsworth as the man who struck Cox.

FBI agents interviewed Rov L. Waldrop and showed him a group of photographs; based on his recollection of the assault, he chose, although he

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[3] In opening statement defense counsel stated: "No one has questioned, as I have said before, that the assault occurred *** Mr. Ellsworth did, indeed, give him a black eye."

couldn't be sure about it, a picture of Ellsworth as being the attacker, and this was admitted without objection. In addition to these in-court photographic identifications of Ellsworth as Cox's attacker, the jury viewed a T-shirt with the words "Satisfaction Guaranteed" on the front in glittering letters, which was allegedly worn by the attacker and later found pursuant to a search authorized by warrant at Ellsworth's house. That search also produced a pair of black leather gloves weighted in the knuckles and found in Ellsworth's bedroom. Those were admitted without objection. Other dark color gloves were also found there. Cox's attacker was described to have worn gloves by witnesses Nanini, Hess, Waldrop, and Smalley.

I.

WAS APPELLANT'S RIGHT TO DUE PROCESS OF LAW VIOLATED BY THE MANNER IN WHICH FOUR STATEMENTS OF POTENTIAL WITNESSES WERE PRODUCED TO APPELLANT'S COUNSEL?

On February 29, 1980, Ellsworth filed requests for exculpatory evidence. The United States responded March 3 by acknowledging its duty under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), but opposing delivery of Brady materials, if any there were, until trial. The opposition was based in part upon the stated desire to protect anticipated government witnesses who had expressed grave concern for their safety and feared reprisals. The United States further responded that it would produce Brady materials, if any there were, and that it did not consider minor discrepancies in eyewitnesses' descriptions to be Brady material, and that it possessed no exculpatory evidence tending to show that Ellsworth did not commit the attack.

In an Order dated March 6, 1980, the pretrial magistrate instructed the United States to comply with the following Brady requests by producing any such evidence at trial:

1. any and all statements or evidence of statements, hearsay or otherwise, which describe or identify defendant Phillip Ellsworth in any manner inconsistent with Ellsworth's actual description and identification;

2. any statements or evidence of statements which describe or identify defendant Phillip Ellsworth in a manner that is inconsistent with each other;

3. any statements which describe the gloves worn by Cox's alleged assailant in any manner other than as "weighted gloves" or "sap gloves" or any other such expression which denotes or connotes that the assailant's gloves were extraordinary in design or designed to be

used as a weapon;

4. any statements by any witnesses describing any T-shirt worn by the alleged assailant which descriptions are either

(a) inconsistent with each other, or

(b) inconsistent with the T-shirt seized at Mr. Ellsworth's home by Special Agents of the FBI on or about October 24, 1979.

The magistrate's Order also required the United States to disclose immediately the Brady material requested by Ellsworth in request No. 5 which reads:

5. any evidence, whether statement of witnesses or otherwise, indicating or suggesting that Mr. Jerry Lee Cox was struck by anyone other than defendant Phillip Ellsworth on October 15, 1979; this request is intended to include evidence that anyone in addition to Mr.

Ellsworth struck Mr. Cox.

The United States produced no evidence indicating that Cox was struck by anyone other than or in addition to Ellsworth and maintained that it had no such evidence.

On March 12, 1980, prior [4] to the making of opening statements by either party, Assistant United States Attorney, Nelson P. Cohen delivered to defense counsel John Suddock, at defense counsel's table in the Courtroom, copies of the statements of Dora Holmes, Marv Hicks, Michael Nichols and Ed Parsons.

After trial, Dora Holmes was re-interviewed by an FBI agent. She was shown a photographic spread out of which she chose Ellsworth as the person she saw

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[4] At one juncture in the processing of the post-conviction motion for a new trial defendant's counsel contended that the information was furnished after opening statements, but did not substantiate this claim.

hit Cox on October 15, 1979. She stated: "That's him. I am sure that is definitely him". In her affidavit she had stated that 1) two men came into the terminal, one larger than the other; and 2) the larger man was dressed in a dark leather jacket, gloves and heavy boots, and went over near the coffee machine and struck Cox.

In a post-trial interview of Mary Hicks, she stated that she was two big men come into the terminal; the large man, wearing black leather gloves and a black leather jacket, struck Cox.

During preparation for trial an interview of Michael Nichols was conducted by FBI agents, in which he was unable to pick Ellsworth out of a photographic line-up. In a post-trial affidavit, Nichols stated: "My location during the assault was such that I did not have a full face view of the

assailant. I saw his face from an angle for a fraction of a second during the assault."

Ed Parsons, a 73 year old man, gave a statement after the incident that the man who struck Cox was over seven feet tall. Parsons was unable to describe any clothing and did not pick Ellsworth from a photo spread. He was sitting near Nichols at the time of the attack.

[1] This Court's consideration of the conduct of counsel for the government, in this and every case, attends the guidelines espoused by the United States Supreme Court:

> The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a

> criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at leiberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[5]

This Court, upon examination of the record, does not find the conduct of the

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[5] Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935).

prosecution to rise to the level of a denial of Due Process or of such impact as to deny defendant a fair trial. We are not confronted with perjured testimony or a statement of an accomplice or codefendant, as in Bradv, supra, nor with evidence that would affect the outcome of the trial. Since Bradv rejected the test of good faith or bad faith of the prosecutor, we must reckon with the judgment call made by the prosecutor tha the evidenc was not exculpatory,[6] and a finding by the trial judge, After reviewing the entire record, that the disclosure of the statements at the beginning of trial was not of sufficient significance to result in the

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[6] "If evidence highly probative of innocence is in his [prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it." United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

denial of defendant's right to a fair trial. See United States v. Agurs, supra.[7] Believing that a prosecutor should not only avoid unfairness but the appearance of unfairness, we do not condone the withholding of these statements until just prior to opening arguments; we observe that such conduct should not be the usual practice.

Our review convinces us that the conduct did not meet the four requirements for a due process violation as prescribed in Agurs, supra, and United States v. Baxter, 492 F.2d 150, 173-174 (9th Cir. 1973).[8] The evidence was not

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[7] See also, Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); United States v. Shelton, 588 F.2d 1242, 1249 (9th Cir. 1978); United States v. Bracy, 566 F.2d 649, 656 (9th Cir. 1977).

[8] "To establish a violation of due process, the defendant must show (1) a request by the defendant for favorable evidence possessed by the prosecutor, (2) suppression of evidence by the

suppressed by the prosecutor here; it was tardily produced, but it was produced before opening statements. No request was made for a recess, continuance, postponement or mistrial. Only after defendant had taken his chance with the jury was the issue raised. We find no error in such proceedings. See, e.g., United States v. Ramirez, 608 F.2d 1261, 1264-65 (9th Cir. 1979) (no prejudice when information received the morning of trial and defendant could have moved for continuance); United States v. Smith, 609 F.2d 1294, 1302-03 (9t Cir. 1979) (no prejudice when received after testimony began despite order to produce before trial); United States v. Burke, 506 F.2d 1165 (9th Cir. 1974) (failure of defense counsel to read statement produced at

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[8] prosecutor, (3) that the evidence suppressed is favorable to the defendant and (4) that the evidence is material."

close of government's case is not prosecutorial error.)

The record does not reveal that an airport police report was suppressed, withheld, or tardily produced by the government. The government's brief states that the report was discovered after trial; in his reply brief appellant does not refute this. It is elementary that the government cannot suppress that which it does not have, or know about. Additionally, the report does not contain information of such materiality or impact as to create a reasonable doubt that did not otherwise exist. See, United States v. Ramirez, 608 F.2d at 1265. The hearsay statement in the report, of a disclaimer by Cox, would not give rise to a reasonable doubt in light of the entire record.

II.

DID THE INDICTMENT FAIL TO ALLEGE AN ESSENTIAL ELEMENT OF THE CRIME?

Appellant complains that the indictment is fatally defective because it fails to allege that Cox was a Department of Interior employee assigned to one of the duties enumerated in 18 U.S.C. § 1114. That section makes it a crime to, inter alia, assault "any officer or employee...assigned to perform investigative, inspection, or law enforcement functions". We disagree.

Rule 7(c)(1), Federal Rules of Criminal Procedure, requires:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

We examine the indictment in the light of a previous announcement of this Court in United States v. Pheaster, 544 F.2d 353,

360 (9th Cir. 1976) [citing and quoting Russell v. United States, 369 U.S. 749, 763, 82 S.Ct. 1038, 1046, 8 L.Ed.2d 240 (1962) and Smith v. United States, 360 U.S. 1, 9, 79 S.Ct. 991, 996, 3 L.Ed.2d 1041 (1959)] that "'convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused'". Restating the Russell criteria to be used in evaluating a challenged indictment, we stated:

> These criteria are, first whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, secondly, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

(citations and qomitted).

[2] The indictment follows the statute and alleges the time, place and manner of the violation of law, that the victim was assaulted, and that the victime came within the ambit of 18 U.S.C. §§111 and 1114. It also charges the victim's official capacity and that he was on dutv. Ellsworth was sufficientlv advised of the charge--the crux was the assault, not the job description particulars of one alleged to be "on duty". See United States v. Tijerina, 407 F.2d 349, 353 (10th Cir. 1969). The tests of Pheaster are met, and Rule 7(c)(1) is complied with. Moreover, the record reveals this issue was raised onlv in post-trial proceedings. Thus, a liberal construction would be the rule, United States v. Pheaster, supra, and even if there were a missing statutory element,

it could be easily implied from the language used in this indictment. See, Kaneshiro v. United States, 445 F.2d 1266, 1269 (9th Cir. 1971).

III.

DID THE TRIAL COURT FAIL TO CHARGE AN ESSENTIAL ELEMENT OF THE OFFENSE?

[3] Appellant also contends the trial judge erred by failing to instruct the jury that they must find the person assaulted was a member of one of the classes of federal employees designated by 18 U.S.C. § 1114. The following instructions given the jury are pertinent to this issue:

INSTRUCTION NO. 7

Section 111 of Title 18 of United States Code provides in part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on

account of the performance of his official duties;

shall be guilty of an offense against the law of the United States; and further provides that:

Whoever, in the commission of any such acts uses a ... dangerous weapon

shall be punished as provided by law.

INSTRUCTION NO. 8

Three essential elements are required to be proven in order to establish the offense charged in the indictment:

FIRST: That the defendant forcibly assaulted an officer of the United States Geological Service of the United States Interior Department, while such officer was engaged in the performance of his official duties, as charged;

SECOND: That the defendant used a dangerous weapon in the commission of the

forcible assault, as charged; and

THIRD: That the defendant did such acts willfully.

INSTRUCTION NO. 9

Section 1114 of Title 18 of the United States Code describes various categories of federal officers and employees including the following:

> "Any officer or employee of...the Department of the Interior... assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, ..."

Whether or not, at the time of the alleged assault, Mr. Cox was acting in an official capacity in the performance of his official duties is a question for the jury to decide from all the evidence in the case.

INSTRUCTION NO. 10

> Among the official duties of officers and agents of the United States Geological Service of the United States Interior Department are inspections of oil drilling apparatus to insure compliance with various Federal laws.

We think the above language of the charge employed by the trial judge reveals no insufficiency in defining the offense. 18 U.S.C. §111 not only protects the person named in 18 U.S.C. § 1114 who is "engaged in the performance of his official duties," but also protects anyone assaulted "on account of the performance of his official duties." United States v. Heck, 499 F.2d 778, 792 (9th Cir. 1974). Furthermore, the charges given are approved as proper in prosecutions involving the statutes here involved. See Mathes and Devitt, Federal

Jury Practice and Instructions (1965), § 20.01 et seq.

The charge was without error.

IV

WAS THE SEARCH WARRANT ISSUED WITHOUT SUFFICIENT FACTUAL BASIS?

[4] Appellant's attack on the issuance of the search warrant is that "the affidavit's (Steele, FBI Agent, affiant) fatal deficiency is that it sets forth no facts that would lead a neutral and detached magistrate to conclude that probable cause existed to believe that Phillip Ellsworth committed any assault". This Court does not agree. The affidavit the magistrate relied on gave the source of the agent's belief that Ellsworth was the one engaged in the criminal activity which spawned the application for a search warrant. The sources named were eye witnesses from the general public, not professional witnesses. Supporting evidence of cause is found in the

descriptions of Ellsworth and his clothing, and the fact that Ellsworth had been indicted for assault.

In addition to the information supplied by the witnesses on the scene identifying appellant with the alleged crime, and thus targeting his house as the possible location of critical evidence, we have the indictment. The magistrate has the same right as the court to take judicial notice, United States v. Sevier, 539 F.2d 599, 603 (6th Cir. 1976), and affidant having advised the magistrate of the indictment, the information was before him. Reading the affidavit in a common sense and realistic fashion, United States v. Carignan, 600 F.2d 762, 764 (9th Cir. 1979), the magistrate was not in error in finding probable cause.

[5] Our examination is guided by those cases holding that only the

probability, and not a prima facie showing, of criminal activity is the standard for probable cause. Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637, 645 (1969), citing Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d. 142, 147 (1964)[9]. And in judging probable cause, issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684, 689 (1965).

The Supreme Court has held that the affidavit in support of a warrant may be based on hearsay if underlying circumstances, known to the magistrate, are credible or reliable. Jones v. United States, 362 U.S. 257, 80 S.Ct.

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[9] See also United States v. Fried, 576 F.2d 787 (9th Cir. 1978).

725, 4 L.Ed.2d 697 (1960); Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). There is no showing but that the magistrate was neutral and detached. A substantial basis for crediting the hearsay may be found in the fact that six witnesses gave the hearsay information, no one of whom was an officer. This credible information, coupled with the fact of indictment, was a sufficient basis for issuing the search warrant.

[6] We are not persuaded by the government's argument that a magistrate can rest a decision as to probable cause to search on the mere fact of a previous indictment. A Grand Jury is not a court, and its spectrum of responsibility does not include the duty of determining probable cause or lack thereof to search,

nor the making of a decision as to whether a search warrant should issue. It determines only whether there is sufficient evidence to cause an accused to stand trial before a petit jury. United States v. Levinson, 405 F.2d 971 (6th Cir. 1968). We find no authority for holding, and do not so hold here, that an indictment alone constitutes sufficient probable cause to issue a search warrant.

V.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT A VERDICT OF GUILTY OF ASSAULT WITH A DEADLY WEAPON?

At the close of the government's case appellant moved for a judgment of acquittal on the charge of assault with a deadly weapon. The trial judge, testing the sufficiency of the evidence under the guidelines of United States v. Kaplan, 555 F.2d 958 (9th Cir. 1977), refused the motion initially and upon post-trial

renewal. A court reviewing that decision uses the same test. United States v. Farris, 614 F.2d 634, 638 (9th Cir. 1979); United States v. Leal, 509 F.2d 122, 125 (9th Cir. 1975); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969):

> That is, viewing the evidence in a light most favorable to the government as prevailing party, is the court satisfied that the jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusions that the defendant is guilty as charged?

United States v. Kaplan, 554 F.2d at 963.

[7] The government positions that the fact weighted gloves were found in appellant's house and near the T-shirt with the identifying insignia, together

with other testimony as to the manner and viciousness of the attack, supply strong circumstances sufficient to support the conclusion that weighted gloves were used as a dangerous weapon.[10] There is simply no evidence linking these gloves to the crime committed. Our review cannot avoid the truth that an older, smaller man was struck in the face, realized no broken bones and no such injury as would be expected if weighted gloves had been used. We do not critize the judgment call of the trial judge; in our view the evidence does not support the charge that calls for a greater sentence. We do find, however, an abundance of evidence to support a verdict of guilty of the lesser offense of assault, with force.

That being so, "[t]he conviction

---

[10] Appellant did not argue that weighted gloves, if used in an assault, are not a dangerous weapon.

can stand, but with a sentence appropriate for the lesser included offense." United States v. Ciongoli, 358 F.2d 439, 441 (3rd Cir. 1966), citing Robinson v. United States, 333 F.2d 323 (8th Cir. 1964); see also United States v. Carter, 522 F.2d 666, 682 at n. 56 (D.C. Cir. 1975); Rule 31(c), Federal Rules of Criminal Procedure.

We cannot avoid a confrontation with the sentence imposed upon the jury's verdict of the greater offense (assault with use of a deadly weapon). We do not possess, and do not here exercise, a review of the sentence given. United States v. Mathis, 579 F.2d 415 (7th Cir. 1978); McCartney v. United States, 382 F.2d 116, 118 (9th Cir. 1967). We do vacate the sentence because it was imposed under the greater offense, and remand the cause to the trial court for sentence under the lesser included

offense of forcible assault, and without direction or suggestion on the part of this Court.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Exhibit B

ORDER AMENDING
OPINION

9TH CIRCUIT COURT OF APPEALS

Filed September 15, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

ORDER

Before: BROWNING, Chief Judge, TANG, Circuit Judge, and HEMPHILL,* District Judge

This Court's opinion in the above case is amended as follows:

On page 2763 of the slip opinion, the following passage is deleted.

> The record does not reveal that an airport police report was suppressed, withheld, or tardily produced by the government. The government's brief states that the report was discovered after trial; in his reply brief appellant does not refute this. It is elementary that the government cannot suppress that which it does not have, or know about. Additionally, the . . .

The following passage is added in its place:

> The record reveals that an airport police report was in the government's file several months before trial, but that the government remained unaware of it until after trial. The . . .

---

* Honorable Robert W. Hemphill, Senior Judge, United States District Court for the District of South Carolina, sitting by designation.

Exhibit C

ITEMS REGARDING
ADDENDUM TO BRIEF
OF APPELLEE

Order of Ninth Circuit Filed November 21, 1980

Motion for Leave to File Affidavits and Addendum, signed November 5, 1980.

Addendum signed November 5, 1980.

Police Reports

Affidavits of Assistant U.S. Attorneys as to possession of exculpatory material.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

ORDER

Before: WRIGHT, Circuit Judge

Appellee's motion of November 10, 1980 to correct its brief with an addendum is granted. The supplemental material will be forwarded to the panel that hears the case on the merits.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

MOTION FOR LEAVE TO FILE AFFIDAVITS AND ADDENDUM

COMES NOW United States of America by and through its undersigned attorney and moves this Court for leave to file Affidavits of trial counsels Nelson P. Cohen and Dan E. Dennis and the Addendum to Appellee's Brief.

DATED this 5th day of November, 1980, at Anchorage, Alaska.

RENE J. GONZALEZ
U.S. Attorney
By: NELSON P. COHEN
Asst. U.S. Attorney

ORDER

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

ADDENDUM

The purpose of this addendum is to correct the statement in Appellee's Brief at page 14 that: "The United States Attorney's office never had possession" of the Airport Police reports and the statements on page 31 that: "The information which was not provided (Airport Police Reports) was not in the government's possession or control. . ."

Those reports were received in the United States Attorney's Office on November 15, 1979. However, the prosecutor's were not aware of the

existence of the reports until post-trial and not aware that they were in possession of them until after appellee's brief was filed. See attachments.

DATED this 5th day of November, 1980, at Anchorage, Alaska.

RENE J. GONZALEZ
United States Attorney

By _____
Asst. U.S. Attorney

AIRPORT POLICE REPORT

(Contains Exculpatory Information
As to Indications of Other Suspects
And Difficulty in Identification
of Defendant)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

AFFIDAVIT

I, DAN E. DENNIS, being duly sworn, depose and say:

I am an Assistant United States Attorney formerly assigned as trial counsel in the above-styled case.

I have now seen the Airport Police Reports attached to the Addendum to appellee's Brief. I was not aware of these reports until the filing of appellant's post-trial motions. I did

not know that they were in the possession of this office until November 4, 1980.

Further your affiant saith naught.

DAN E. DENNIS
Assistant U.S. Attorney

SUBSCRIBED AND SWORN to before me this 5th day of November, 1980, at Anchorage, Alaska.

Notary Public in and for
Alaska, My Commission
Expires: 1-16-83

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

AFFIDAVIT

I, NELSON P. COHEN, being duly sworn, depose and say:

I am an Assistant United States Attorney assigned as trial counsel in the above-styled case.

Office records show that the Airport Police Reports (CR 177, Ex. B) were received in the United States Attorney's office on November 15, 1979. I first became aware that these reports existed when appellant filed post-trial motions. I was not aware that they had been

received and were in the possession of this office until November 3, 1980.

Further your affiant saith naught.

NELSON P. COHEN
Assistant U.S. Attorney

SUBSCRIBED AND SWORN to before me this 5th day of November, 1980, at Anchorage, Alaska.

Notary Public in and for
Alaska, My Commission
Expires: 1-16-83

Exhibit D

ORDER GRANTING EXTENSION
OF TIME IN WHICH TO FILE
PETITION FOR REHEARING AND
SUGGESTION OF APPROPRIATENESS OF
REHEARING EN BANC

9TH CIRCUIT COURT OF APPEALS

Filed August 1981

8

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

ORDER

Before: BROWNING, Chief Judge, TANG, Circuit Judge and HEMPHILL*, District Judge.

The appellant's motion for an extension of time to file a petition for rehearing and suggestion for rehearing en banc is granted.

BY ORDER OF THE COURT
Richard H. Deane
Clerk of Court

By: Christopher W. Vasil
Senior Deputy Clerk

*Honorable Robert W. Hemphill, Senior United States District Judge for the District of South Carolina, Sitting by Designation.

Exhibit E

ORDER DENYING
PETITION FOR REHEARING AND
SUGGESTION OF APPROPRIATENESS OF
REHEARING EN BANC

9TH CIRCUIT COURT OF APPEALS

Filed September 15, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

ORDER

Before: BROWNING, Chief Judge, TANG, Circuit Judge, and HEMPHILL,* District Judge

The Request for Oral Argument as to Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc is denied.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Robert W. Hemphill, Senior Judge, United States District Court for the District of South Carolina, sitting by designation.

Exhibit F

ORDER GRANTING

MOTION TO RECALL MANDATE

9TH CIRCUIT COURT OF APPEALS

Filed October 14, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PHILLIP JOHN ELLSWORTH,	)
	)
Defendant-Appellant.	)
	)

No. 80-1369

ORDER

The appellant's motion to recall the mandate is granted. The issuance of the mandate is staved pending application for writ of certiorari pursuant to Fed. R. App. P. 41(b).

BY ORDER OF THE COURT:

Christopher W. Vasil
Acting Clerk of Court

Exhibit G

ORDER EXTENDING
TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

Dated October 6, 1981

SUPREME COURT OF THE UNITED STATES

No. A-275

PHILLIP JOHN ELLSWORTH,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 20, 1981.

/s/William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

DATED this 6th day of October, 1981.

Exhibit H

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

AMENDMENTS TO THE CONSTITUTION.

Article IV.

Searches and seizures. The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have

the assistance of counsel for his defense.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7. The Indictment and Information

(a) Use of Indictment or Information. An offense which may be punishable by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment. An offense which may be punishable by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the

charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each

count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violted.

(2) Criminal Forfeiture. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) Harmless Error. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before the arraignment or within ten days after arraignment or at such time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the

offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defndant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the

government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defndant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief

at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of

subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (A)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(4) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

...

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the

judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner

of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

Rule 23. Trial by Jury or by the Court

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum

of decision is filed, it will be sufficient if the findings of fact appear therein.

Rule 31. Verdict.

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an

offense necessarily included therein if the attempt is an offense.

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within

the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property Which May Be Seized with a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for

the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified

period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provisions in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

UNITED STATES CODE

18 U.S.C. §111

Assaulting, Resisting, or Impeding Certain Officers or Employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not

more than $5,000 or imprisoned not more three years, or both.

Whoever, in the commission of any such act uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §1114

Protection of Officers and Employees of the United States

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal, . . . any officer or employee of the Federal Bureau of Investigation of the Department of Jutice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Drug Enforcement Administration, any officer

or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of

Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration..., any security officer of the Department of State or the Foreign Service, or any officer or employee of the ... Department of the Interior or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties, ... shall be punished as

provided under sections 1111 and 1112 of this article.

Opposition

Supreme Court, U.S.
FILED
APR 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1339

In the Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIP JOHN ELLSWORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the failure of the government to produce statements of nontestifying individuals before trial deprived petitioner of due process or of his right to counsel.

2. Whether the affidavit supporting a warrant issued to search petitioner's home contained adequate information regarding the commission of a federal offense.

3. Whether a remand for resentencing, rather than a new trial, is the proper remedy when an appellate court finds the evidence insufficient to support the jury verdict but sufficient to support conviction of a lesser included offense.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 ..... 4, 5

Mains v. *Butterworth*, 619 F. 2d 83, cert. denied, 449 U.S. 864 6

Robinson v. *United States*, 333 F. 2d 323 9

Rugendorf v. *United States*, 376 U.S. 528 5

Tinder v. *United States*, 345 U.S. 565 9

United States v. *Agurs*, 427 U.S. 97 ..... 4, 5, 6

United States v. *Banks*, 539 F. 2d 14, cert. denied, 429 U.S. 1024 9

United States v. *Berkowitz*, 429 F. 2d 921 9

United States v. *Billingslea*, 603 F. 2d 515 9

United States v. *Bryant*, 454 F. 2d 248 9

United States v. *Bush*, 623 F. 2d 388 9

United States v. *Del Valle*, 587 F. 2d 699, cert. denied, 442 U.S. 909 8

Page

Cases—Continued:

United States v. *DiGilio*, 538 F. 2d 972, cert. denied, 429 U.S. 1038 9

United States, Ex parte, 287 U.S. 241 8

United States v. *Harris*, 403 U.S. 573 9

United States v. *Industrial Laboratories Co.*, 456 F. 2d 908 9

United States v. *Lamartina*, 584 F. 2d 764, cert. denied, 440 U.S. 928 9

United States v. *Librach*, 609 F. 2d 919, cert. denied, 444 U.S. 1080 6

United States v. *Menghi*, 641 F. 2d 72, cert. denied, 451 U.S. 975 5

United States v. *Provenzano*, 615 F. 2d 37, cert. denied, 446 U.S. 953 6

United States v. *Scott*, 555 F. 2d 522 9

United States v. *Ventresca*, 380 U.S. 102 8

United States v. *Witt*, 618 F. 2d 283, cert. denied, 449 U.S. 882 5

Statutes and rule:

18 U.S.C. 111 2

28 U.S.C. 2106 9

Fed. R. Crim. P. 31(c) 9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-40) is reported at 647 F. 2d 957.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1981. A petition for rehearing was denied on September 15, 1981 (Pet. App. A-58 to A-59). On October 6, 1981, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to November 20, 1981. The petition was filed on January 18, 1982, as of November 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of assaulting a federal employee with the use of a dangerous weapon,

in violation of 18 U.S.C. 111. He was sentenced to imprisonment for three years. Finding the evidence insufficient to establish that petitioner had used a dangerous weapon, the court of appeals affirmed the conviction for the lesser included offense of forcible assault on a federal employee, 18 U.S.C. 111, and remanded the case for resentencing.

The evidence showed that the victim, Jerry Lee Cox, was a petroleum engineer technician, employed by the United States Geological Survey, a division of the Department of the Interior (Tr. 12).[1] In mid-October 1979, Cox's supervisor was advised that an oil company intended to resume operating a well on the North Slope that had been shut down by a strike. He directed Cox to make a routine inspection of the well (Tr. 109-110). At approximately 6:00 a.m. on October 15 Cox arrived at the Anchorage airport to await his flight to the North Slope. After checking his baggage, Cox obtained coffee from a machine and sat in a seat inside the terminal (Tr. 15-17).

In the meantime a number of strikers, some carrying picket signs, gathered in the airport parking lot. Some individuals passed the picketers and prepared to fly to the North Slope for work. Two men associated with the strikers entered the terminal. Petitioner, the larger of the two, wore a black jacket over a T-shirt on which the words "Satisfaction Guaranteed" had been imprinted in glittering letters (Tr. 57-58). He also wore black gloves and repeatedly slapped one hand against the other (Tr. 72, 97).

Petitioner sat beside Cox. He then stood up, asked Cox "What the hell are you staring at?" (Tr. 19), and struck Cox on the left side of his face, causing a black eye. He said to Cox, "You goddam scabs are going to take away all our jobs" (Tr. 74).

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[1] "Tr." refers to the trial transcript. "R." refers to the Excerpt of Record filed in the court of appeals.

On October 24, petitioner was arrested by FBI Agent Roger Lee. At the time of his arrest petitioner was wearing a black jacket, which Agent Lee seized. When petitioner asked why he was being arrested, Lee replied that it was in connection with the assault that had occurred at the airport terminal on October 15. Petitioner responded, "You mean the guy that spilled coffee all over me?" (Tr. 138-139).

The next day FBI agents searched petitioner's house pursuant to a warrant and discovered in his bedroom a pair of black gloves that had been weighted in the area of the knuckles. Also found was the T-shirt bearing the lettering "Satisfaction Guaranteed" (Tr. 118-122, 128-129).

ARGUMENT

1. At trial petitioner was identified as the assailant by Cox and one other eyewitness (Tr. 27, 75). Three other eyewitnesses were unable to identify petitioner in the courtroom, but gave descriptions of the assailant that matched petitioner (Tr. 57-58, 81-83, 97-98). The defense theory was not that someone else had committed the assault but that petitioner had not used a dangerous weapon and that his conduct did not constitute a federal offense.

At the beginning of the trial the prosecutor produced to defense counsel copies of statements given by four non-testifying eyewitnesses, Mary Hicks, Michael Nichols, Dora Holmes and Ed Parsons. In their statements Hicks and Holmes said that the assailant had worn a blue, down-filled jacket (R. 160, 167). Nichols said that the person who struck Cox wore a T-shirt that possibly had long sleeves; in addition, Nichols was unable to select petitioner's photograph from others in an array (R. 165-166). Parsons, age 73, stated that the man who struck Cox was more than seven feet tall. Parsons also was unable to pick petitioner's photograph from a spread (R. 170-171). During the three-day trial defense counsel made no mention of these statements.

Following conviction, petitioner filed a motion for a new trial alleging that the belated production of the four statements violated his due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). Petitioner claimed that he was prejudiced because the statements, which in petitioner's view raised a doubt that he was the assailant, were of no use to him since they were produced after defense counsel, Mr. Kulik, had conceded in his opening argument that petitioner was the individual who had struck Cox (R. 137-156). In response, the prosecutor stated that he provided the statements to Kulik's co-counsel prior to the commencement of opening statements; that the statements did not identify someone else as the attacker; and that they were not exculpatory in any material way. Attached to the government's response was the affidavit of an FBI agent attesting to the delivery of the statements before opening argument. Other affidavits submitted to the district court revealed that in supplementary interviews Holmes had selected petitioner's picture from a six-photograph array, that Hicks had indicated that if called to testify she would state that the assailant wore a black jacket and that his accomplice wore a down-filled jacket; and that Nichols acknowledged having had a poor view of the incident and having seen the face of the attacker for only a fraction of a second (R. 181-194). After reviewing the record, the district court denied the motion for a new trial (R. 224-249). The court of appeals agreed that the incident did not entitle petitioner to a new trial (Pet. App. A-14 to A-24).

In this Court petitioner renews his claim of reversible error based upon what he regards as an untimely production of the statements. We think it clear that the courts below were correct in ruling that petitioner is not entitled to relief.

Initially, we note that petitioner continues to maintain without any support in the record that the defense did not receive the statements until after opening argument, during which counsel had conceded petitioner's involvement in the assault (Pet. 6, 7). On the contrary, as the court of appeals noted, the evidence was produced before opening argument (Pet. App. A-17). Following receipt of the statements defense counsel made no reference to them at any point in the trial. He did not inform the trial judge of the allegedly belated delivery or complain of any prejudice therefrom, and he requested no recess, continuance, postponement or mistrial. Having failed to issue any timely objection to the allegedly late production of the statements, and having failed to provide the district court with the opportunity to investigate possible corrective measures, petitioner should not be rewarded with a new trial for what is apparently a deliberate bypass of a timely claim in the district court. See *Rugendorf* v. *United States*, 376 U.S. 528, 534-535 (1964); *United States* v. *Menghi*, 641 F. 2d 72, 75 (2d Cir.), cert. denied, 451 U.S. 975 (1981); *United States* v. *Witt*, 618 F. 2d 283, 286-287 (5th Cir.), cert. denied, 449 U.S. 882 (1980).

In any event, the appropriate due process inquiry must focus upon the character of the evidence rather than on the conduct of the prosecutor. *United States* v. *Agurs*, *supra*, 427 U.S. at 110. The contents of the four statements fall considerably short of the standard of materiality required by *Agurs* in order to entitle petitioner to a new trial. *Agurs* provides that evidence suppressed by the government or belatedly produced after a timely, albeit general, request by defense counsel for *Brady* material, can be the basis for a new trial only if, evaluated in the context of the entire record, it creates a reasonable doubt regarding the defendant's guilt that did not otherwise exist. 427 U.S. at 112-113. In this case, the statements of Hicks, Nichols, Holmes, and

Parsons did not suggest that someone other than petitioner had committed the assault. The district court was aware that although two of the individuals had misdescribed the type of jacket worn by petitioner, one of these two was prepared to identify petitioner as the attacker if called to the stand. The other two statements were given by individuals who acknowledged that they did not have an unobstructed view of the incident. By contrast, the government adduced testimony from five individuals who gave vivid descriptions of the unusually large individual who committed the assault; as the jury could readily see, petitioner clearly matched those descriptions. In addition, petitioner's statement to the arresting officer contained a virtual acknowledgement that he had been involved in the assault. None of this evidence would have been affected by anything that the four individuals whose statements were produced at trial might have testified to if called to the stand. Thus, the statements could not have created a reasonable doubt and none existed without them. *Mains* v. *Butterworth*, 619 F. 2d 83 (1st Cir.), cert. denied, 449 U.S. 864 (1980); *United States* v. *Provenzano*, 615 F. 2d 37, 49 (2d Cir.), cert. denied, 446 U.S. 953 (1980); *United States* v. *Librach*, 609 F. 2d 919 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

Finally, we note that even now petitioner does not deny having committed the assault. His contention is that his right to counsel was somehow impaired and that the defense strategy would have been different had he known that some eyewitnesses, who did not testify at trial, had not clearly identified him as the assailant (Pet. 6-8, 14-15). *Agurs* does not authorize relief because statements suppressed by the government might have changed the trial strategy rather than the validity of the verdict. On the contrary, the Court in *Agurs, supra*, 427 U.S. at 112-113 & n.20, specifically rejected the argument that the standard of materiality should focus on the impact of the omitted evidence on the

defendant's ability to prepare for trial rather than the materiality of the evidence to the issue of guilt.[2]

2. Petitioner alleges that the affidavit supporting the warrant authorizing the search of his house was defective because it failed to state a factual basis for the conclusion that a federal offense had been committed and because it contained no sources for the belief that the unnamed informants were credible or reliable. There is no merit to this claim.

In brief, the affidavit stated that petitioner had been indicted on a charge of assaulting a federal officer; that the affiant had seen petitioner departing from his residence; that six eyewitnesses to the assault had given descriptions of the attacker generally consistent with petitioner's physical makeup; that five of the six, and the assault victim as well, had stated that the assailant wore gloves; that five eyewitnesses had said that the gloves were black or dark colored; that the sixth eyewitness had described the jacket and the "Satisfaction Guaranteed" T-shirt worn by the assailant; and that when arrested petitioner had worn a jacket fitting the description of the one seen by the eyewitness. An

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[2]Petitioner also contests the nonproduction of two airport police reports. In one report the officer stated that he asked Cox whether he could identify the assailant and Cox said no. In the other report an officer indicated that four unnamed individuals had given him a list of eight strikers involved in the attack. Petitioner's name was not among the eight on the list (R. 234, 236-237). The prosecutor was unaware that he had possession of the reports until after petitioner's trial (Pet. App. A-43). He produced them in time for the courts below to evaluate their possible impact on the verdict. We submit that the court of appeals was correct in ruling that the hearsay reports, if known to the defense at the time of trial, would not have given rise to a reasonable doubt regarding petitioner's guilt. The two reports were prepared by individuals who were not present at the assault. One report had only slight impeachment value and the other was too vague to be useful except to generate collateral issues unrelated to guilt or innocence.

addendum to the affidavit stated that petitioner was driving a truck when arrested and a tear gas canister similar to one used during the incidents that included an assault on a federal officer was discovered in the truck. Based upon this information the magistrate issued a warrant authorizing a search of petitioner's house for black or dark colored gloves and for a T-shirt with "Satisfaction Guaranteed" printed across the front (R. 22-25).

This affidavit, read in a common sense, nontechnical manner (*United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)), was sufficient to justify issuance of the warrant, since it provided the magistrate with an adequate basis for finding probable cause that a federal offense had been committed; that petitioner was the offender; and that evidence associated with the offense was located in the place to be searched. The information regarding petitioner's federal indictment, while in itself insufficient to justify a search of petitioner's home,[3] certainly provided cause to believe that petitioner had committed a federal offense. The magistrate was informed that a grand jury had charged petitioner with a federal offense after reviewing evidence amounting to probable cause—the same standard employed by the magistrate. The additional information contained in the affidavit established probable cause to believe that articles worn by petitioner when the assault was committed could be found at his home. See *United States* v. *Del Valle*, 587 F. 2d 699, 701-702 (5th Cir.), cert. denied, 442 U.S. 909 (1979).

Most of the information contained in the affidavit was furnished by witnesses to the assault who were not professional informants. In addition, the information given by each eyewitness matched that given by other sources, and

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[3]The existence of the indictment, without more, would have been sufficient to justify issuing an arrest—as opposed to a search—warrant. *Ex parte United States*, 287 U.S. 241 (1932).

the agent provided corroboration by detailing the results of his own observations and investigation. Those circumstances amply satisfied the requirement that the magistrate be furnished with the basis for crediting the information and the reliability of the persons giving it. See *United States* v. *Harris*, 403 U.S. 573, 580-583 (1971); *United States* v. *Bush*, 623 F. 2d 388, 390-391 (5th Cir. 1980); *United States* v. *Scott*, 555 F. 2d 522, 527 (5th Cir. 1977); *United States* v. *Banks*, 539 F. 2d 14, 16-17 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

3. Contrary to petitioner's contention, where an appellate court determines that the evidence fails to support the conviction of a greater offense, but does support a conviction of a lesser included offense, and the jury verdict is otherwise unexceptionable, the proper remedy is to remand for resentencing rather than for a new trial. Appellate courts have statutory authority to direct such a result (see 28 U.S.C. 2106; cf. Fed. R. Crim. P. 31(c)), and have frequently exercised that authority. *E.g.*, *Tinder* v. *United States*, 345 U.S. 565, 570 (1953); *United States* v. *Billingslea*, 603 F. 2d 515, 520 (5th Cir. 1979); *United States* v. *Lamartina*, 584 F. 2d 764, 767 (6th Cir. 1978), cert. denied, 440 U.S. 928 (1979); *United States* v. *DiGilio*, 538 F. 2d 972, 981 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States* v. *Industrial Laboratories Co.*, 456 F. 2d 908, 911-912 (10th Cir. 1972); *United States* v. *Bryant*, 454 F. 2d 248, 251 (4th Cir. 1972); *United States* v. *Berkowitz*, 429 F. 2d 921, 928 (1st Cir. 1970); *Robinson* v. *United States*, 333 F. 2d 323, 326 (8th Cir. 1964). The remand for resentencing ordered by the court of appeals is thus in accord with well settled law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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